IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 9675 of 2005
To
CRIMINAL MISC.APPLICATION No. 9679 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

PRASHANT KINARIWALA CHAIRMAN OF KINARIWALA SPINNER - Applicant(s)

Versus

STATE OF GUJARAT & 1 - Respondent(s)

==========

Appearance :
MR HN BRAHMBHATT for Petitioner No(s).: 1.

KOGJE, Ld. APP for Respondent No(s).: 1.
None for Respondent No(s).: 2.
==========

CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 26/08/2005

COMMON ORAL JUDGMENT

1.Leave to delete Respondent No.2, who is the original complainant as party respondent.

2. **Rule**. Mr.Kogje, learned APP waives service of Rule on behalf of the respondent State. With the consent of the parties, the matter is taken up for final hearing.

3. The only question which arises for consideration is whether the learned Magistrate was justified in issuing non-bailable warrant on account of the absence of the accused concerned.

4. Upon hearing Mr.Brahmbhatt, learned Counsel for the petitioner and Mr.Kogje, learned APP for the respondent State, it appears that on factual aspect there is no dispute that the exemption application was made and the same was not granted. There is also no dispute on the point that the learned Magistrate has issued non-bailable warrant. There is also no dispute on the point that all cases are pertaining to dis-honouring of cheques under Section 138 of Negotiable Instruments Act, which are summons triable cases.

5. The perusal of the order passed by the learned Magistrate dated 12.8.2005 below application for exemption shows that the said application has been rejected. However, on the very day on behalf of the Complainant, an application is filed and the learned Magistrate has issued a non-bailable warrant, which appears to be a harsh exercise of discretion vested to the learned Magistrate. Considering the facts and

circumstances that it was summons triable case and earlier no bailable warrant was issued. When the application for exemption was made, the accused may reasonably believe that the application may be considered and may be granted. If such application is rejected in exercise of the proper discretion, the learned Magistrate ought to have directed the accused to remain present either on the same day or on the nearest short date. Even if the learned Magistrate was not inclined to exercise the discretion in such a manner, he could have passed the order for issuing bailable warrant. However, it appears that in the impugned order, the learned Magistrate has not recorded any reason as to why the non-bailable warrant deserves to be issued and the ends of justice would not be served by issuing bailable warrant. Therefore, it appears that if such an order is allowed to stand, it may result into causing great injustice to the accused, because it is not even recorded by the learned Magistrate that on account of the absence of the accused, serious prejudice is caused to the case of the complainant or that such absence could not have been compensated by awarding some reasonable cost to the complainant. Therefore, I find that the exercise of the discretion by the learned Magistrate is to result

into great injustice and it was not warranted to the extent to which the power is exercised by the learned Magistrate.

6. Mr.Brahmbhatt, learned Counsel appearing for the petitioner has agreed to pay the penalty of Rs.500/- for remaining absent in each case and has further agreed to pay the cost of Rs.750/- per matter, total Rs.3,000/- in all group of petitions towards the cost of the State for the default of the petitioner for not remaining present and towards the cost of litigation. Mr.Brahmbhatt has also agreed that the petitioner shall positively remain present on the next date which is fixed on 8th September, 2005.

7. Considering the facts and circumstances, I find that if the petitioner pays the penalty of Rs.500/- towards cancellation of each warrant and further pays the cost of Rs.750/- per matter towards the cost of litigation, the order passed by the learned Magistrate for issuing non-bailable warrant can be set aside with the further directions to the petitioner to remain present on 8.9.2005 before the learned Magistrate.

8. Hence, the impugned order passed by the learned Magistrate dated 12.8.2005 for issuing non-bailable warrant is quashed on condition that the petitioner deposits the amount of Rs.500/- for each criminal case

before the learned Magistrate on or before 6.9.2005 and further deposits the amount of Rs.750/- per matter towards cost of litigation to the Government, total Rs.3,000/- with this Court and shall remain present on 8.9.2005 before the learned Magistrate. It is clarified that in the event the petitioner fails to remain present on 8.9.2005 before the learned Magistrate, it would be open to the learned Magistrate to issue bailable warrant against the petitioner.

9. The petitions are partly allowed to the aforesaid extent. Rule made absolute accordingly. Upon deposit of the amount of Rs.3,000/-, the Office of the Government Pleader shall be at liberty to withdraw the same towards cost of litigation.

Direct service is permitted.

26.8.2005 **(Jayant Patel, J.)**

vinod